

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Manitowoc, Wisconsin

NUCLEAR MANAGEMENT COMPANY, LLC¹

Employer

and

Case 30-RC-6556

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 2150, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION³

The Union seeks to represent a bargaining unit of engineers, engineering analysts, information technology analysts, licensing regulatory affairs employees, configuration management, planning specialists, procurement employees, and quality assurance assessors.

Following the filing of the petition, a hearing was held on the following three issues:

- 1) Is the unit, as petitioned for by the Union, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act?
- 2) Are the planning specialists professional employees as defined by Section 2(12) of the Act?
- 3) Are the information technology team leaders – Michael Johnson and Donald Munro – supervisors within the meaning of Section 2(11) of the Act?

As discussed below, I find that: (1) a unit of professional employees in the petitioned-for departments is appropriate; (2) there is insufficient evidence in the record to determine the

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

professional status and unit placement of the three planning specialists in the overall unit of nearly 120 employees, and they shall be permitted to vote under challenge; and (3) the information technology team leaders are statutory supervisors and ineligible to vote. Taking these determinations into account, I conclude that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All professional employees, including full-time and regular part-time engineers, engineering analysts, information technology analysts, licensing regulatory affairs employees, configuration management, procurement employees, and quality assurance assessors employed by the Employer at its Point Beach, Wisconsin facility; excluding all office clerical employees, technicians, production and maintenance employees, all job classifications included in other bargaining units, managers, guards and supervisors as defined in the Act.⁴

DISCUSSION

The Employer operates the Point Beach Nuclear Power Plant located near Two Rivers, Wisconsin, under contract with the owner of the plant. On October 10, 2003, the Petitioner filed a petition seeking to represent a unit generally comprised of non-supervisory professional employees working for the Employer. In the departments the Petitioner seeks to represent, there are approximately 120 employees. The bulk of these employees, about 90, are engineers working in the engineering department, where they plan, develop, and implement engineering projects necessary in the operation of the plant. The remaining employees, which the Employer seeks to exclude, also contribute to the operation of the plant: information technology employees provide hardware and software support; quality assurance assessors provide oversight of other

⁴ The Employer, but not the Petitioner, filed a post-hearing brief that was duly considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

employees' work; regulatory and licensing employees maintain the plant's technical specifications and interact with governmental regulators; configuration management and procedures gather performance indicators and maintain plant procedures; and procurement employees evaluate materials and products needed in the plant. All of these professional employees contribute together to the operation of the nuclear power plant.

A hearing was conducted on October 24, 2003 to determine the appropriate bargaining unit at the Point Beach location. In making that determination, three issues will be addressed.

- 1) Is the unit, as petitioned for by the Union, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act?

The Board's procedure for determining an appropriate unit is to examine the petitioned-for unit, and, if that unit is appropriate, end the inquiry into unit appropriateness. *Bartlett Collins Co.*, 334 NLRB 484 (2001). The unit needs only to be an appropriate unit, and need not be the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), *enfd.* on other grounds 190 F.2d 576 (7th Cir. 1951). For a unit to be appropriate, the key question is whether the employees share a sufficient community of interest, which is determined by examining such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See *Ore-Ida Foods*, 313 NLRB 1016 (1994), *affd.* 66 F.3d 328 (7th Cir. 1995).

In this case, the Union has petitioned for a broad unit of professional employees employed by the Employer. The Board has long held that wall-to-wall units are presumptively appropriate, and similarly, I find that a unit consisting of all the Employer's professional

employees is appropriate.⁵ Additionally, though not determinative, a petitioner's desires as to how the unit is defined has long been held a relevant consideration. See e.g., *Marks Oxygen Co.*, 147 NLRB 228 (1964).

The Employer has focused its objection to the unit primarily on the fact the employees have different supervisors, work in different departments, and have some variation in their training and compensation (the engineers in the engineering department are eligible for a bonus which the others do not receive). However, these distinctions do not diminish the shared interests the proposed unit employees have as professionals for the same Employer. Although differences in supervision and other work conditions are relevant in determining a unit's appropriateness, they are by no means per se grounds for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co.*, 88 NLRB 631 (1950).

The Board has long held that a unit of professional and/or technical employees separate from similarly situated employees is not appropriate without a showing of a community of interest so distinguishable as to warrant the appropriateness of such a unit. See *Pratt & Whitney*, 327 NLRB 1213, 1215 (1999). Such a distinguishable showing was not made here. It is not disputed that these employees at issue are professionals, with the possible exception of the planning specialists discussed below. The record shows, as professionals, these employees have similar levels of education, salaries and benefits, work similar hours under the same policies, and often work under the same working conditions. This was established at hearing through both testimony and documentary job descriptions of the positions in question. Though the

⁵ The parties discussed on the record the number of professional employees in each classification. At page 166 of the transcript, the parties appear to provide differing tallies, with the Petitioner indicating a total of 113 employees (including the 90 engineers in the engineering department) in its proposed unit, and the Employer indicating a somewhat higher number of 121 (90 in the engineering department, plus 7 quality assurance, 12 information technology, 3 procurement, 5 configuration management, and 4 licensing and regulatory employees). Regardless, the unit will include all professionals, including those specifically described in the unit description as found appropriate in this decision.

professionals perform different specific functions for the Employer, they are similarly situated in the terms of their employment, including a general package of benefits. They are also engaged in an integrated operation at a common location. A unit encompassing the whole of this group is appropriate.

The Employer argues that only the engineers in the engineering department should constitute the unit, and therefore would exclude the professionals working in information technology, quality assurance, regulatory and licensing, configuration management and procedures, and procurement. Though smaller groups of the professional employees might also be appropriate, for the Petitioner to seek to represent all similarly situated professional employees of the Employer in one broad unit is clearly not inappropriate. Though the engineering core, found in the engineering department, does not necessarily interact directly with each of the other departments on a daily basis, there is sufficient evidence in the record to establish contact and interaction between these groups of professionals as a whole, with increased interaction occurring more so between certain specific departments.

For example, the engineers interact with information technology employees when they have hardware or software needs, and have a moderate degree of contact with the quality assurance assessors in assisting in the quality oversight process. The engineers interact with the licensing and regulatory department, exchanging information pertinent to the Employer's compliance with governmental regulations, and also interact with configuration management and procedures in gathering performance indicators and maintaining plant procedures. Engineers also interact with the procurement professionals who evaluate the appropriate materials and products needed for operation.

At the hearing, Russell Walesch, a quality assurance assessor, testified that, when doing an

assessment of a department, the assessors establish a relationship with the members of the department they are assessing, including the engineers. Lisa Schofield, an engineer in regulatory affairs, testified that she worked with the other engineers in making changes consistent with regulations. Also, she testified to working on committees with the engineers from the engineering department in evaluating the plant's technical responses to issues like containment, or dry field storage. This testimony establishes a certain degree of interaction between the professionals of the different departments, including the engineering department, furthering a shared community of interest between these employees. Consequently, the unit sought by the Petitioner, though potentially not the most appropriate unit, is an appropriate unit within the meaning of Section 9(b) of the Act. *Marks Oxygen Co.*, 147 NLRB 228 (1964).

2) Are the planning specialists professional employees as defined by Section 2(12) of the Act?

Employees must satisfy each of the four requirements set forth in Section 2(12)(a) before they qualify as professional employees within this definition.⁶ A professional employee is:

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes....”

The Union and the Employer agree as to the professional status of the entire unit except for the employees employed as planning specialists, who the Employer contends are not professionals. The record is sufficient to support the position of the parties as to the professional

⁶ Employees may also qualify as professional employees under Section 2(12)(b) of the Act. This is particularly true for the entry-level professional employees herein who are in the early stages of the career progression within their departments.

status of the other employees.⁷

Unlike the other employees at issue, the planning specialists are not salaried, and are non-exempt employees under the Fair Labor Standards Act.⁸ Whereas the other employees generally have advanced degrees particular to their positions, the planning specialists do not. The record lacks other evidence particular to the planning specialists. As such, the record does not allow me to determine whether they are professional employees or whether they share a sufficient community of interest with the professionals. I note that there are only approximately three planning specialists in the engineering department of an overall unit numbering around 120 employees. In these circumstances, the ultimate status of the planning specialists can be left for a post-election proceeding if necessary. Consequently, the planning specialists will be allowed to vote under challenge in the election.

3) Are the information technology team leaders – Michael Johnson and Donald Munro – supervisors within the meaning of Section 2(11) of the Act?

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor....” The term “supervisor” is defined in Section 2(11) of the Act as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

⁷ The professional status of the employees at issue, excepting only the planning specialists, is not contested. These employees generally have college degrees pertaining to their occupation; the majority in engineering. Additionally, those without degrees undergo formal and on-the-job training as they develop the skills and experience to perform their positions. The record includes job descriptions detailing responsibilities consistent with those of professionals, and all of the employees found to be in this unit have salaries consistent with professional status (the record indicates that annual salaries range from \$49,000 to \$60,000 for Engineer I’s up to \$82,000 to \$91,000 for Principal Engineers. Documentation in the record shows that salaries for Engineer Analysts and Quality Assurance Assessors are also within this range). These employees are also treated as exempt employees under the Fair Labor Standards Act.

⁸ Although employees’ status under the FLSA may be evidence considered in determining professional status under the NLRA, status under the FLSA is not controlling on the Board’s determination. *Kable Printing Co.*, 238 NLRB 1092 (1978).

exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess the authority to engage in any one of the specific criteria listed, or have the authority to effectively recommend any such action, as long as the performance of that function is not routine, but requires the use of independent judgment. See e.g., *Fred Meyer Alaska, Inc.*, 334 NLRB No. 94 (2001). The burden of proving that the contested individuals are supervisors within the meaning of Section 2(11) rests with the party who seeks their exclusion. See *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861, 1866-1867 (2001). Under these standards, I find that the Petitioner has met its burden of proof, and the information technology team leaders are supervisors under the Act.

The Petitioner contends that Michael Johnson and Donald Munro are both supervisors within the meaning of Section 2(11) of the Act. The record demonstrates that each of these individuals is employed as a team leader within the information technology department. At hearing, the unchallenged testimony of the information technology manager, Thomas Carter, established that both Johnson and Munro regularly assign work to employees under them, approve vacations, and are involved in hiring and disciplining employees.⁹ Employees that work with them contact them if they are going to be absent from work. Additionally, Johnson and Munro are involved in the Employer's decision-making processes in these areas, and clearly have the authority to effectively recommend that their superiors take actions indicative of supervisory status.¹⁰ The fact that they have the authority to make these recommendations, is evidence that they themselves are supervisors under the Act. Therefore, I find that Johnson and

⁹ For example, Carter testified that Johnson had issued written discipline to an employee who was let go for untrustworthiness. The Employer objected to the specific name of the individual employee involved being provided at the hearing. As such, it is not part of the record.

Munro are statutory supervisors ineligible to vote in the election.

CONCLUSION

In summary, first, I find that a unit of all professional employees is an appropriate unit within the meaning of Section 9(b) of the Act. Second, as the record is inconclusive as to the professional status of the planning specialists, I will allow them to vote under challenge in the election. Finally, I find that the information technology team leaders are supervisors within the meaning of Section 2(11) of the Act and therefore are ineligible to vote in the election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be

¹⁰ For example, the record shows that Johnson effectively recommended the hiring of an employee, Andy Bussiere.

represented for collective bargaining purposes by International Brotherhood of Electrical Workers, Local 2150, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before November 21, 2003.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by November 28, 2003.**

Signed at Milwaukee, Wisconsin on November 14, 2003.

Joyce Ann Seiser, Acting Regional Director
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